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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LIAH,

Defendant and Appellant.

H044470

(Santa Clara County
Super. Ct. No. C1527421)

A jury found defendant Joseph Liah guilty of corporal injury on a spouse resulting in a traumatic condition. The trial court granted a three-year term of probation including 44 days in county jail.

Liah raises three claims on appeal. First, he contends the trial court erred by failing to instruct the jury sua sponte that he was not guilty if he was acting to defend himself against false imprisonment by his wife. Second, he contends the trial court erred by denying his request for a unanimity instruction as to the conduct underlying the conviction. Third, he contends he was cumulatively prejudiced by these errors.

For the reasons below, we conclude these claims are without merit and we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

The prosecution charged Liah with felony inflicting corporal injury on a spouse resulting in a traumatic condition. (Pen. Code, § 273.5, subd. (a).)¹ The information further alleged Liah had suffered a prior felony conviction resulting in a county jail term under section 1170, subdivision (h). (§ 667.5, subd. (b).) The jury found Liah guilty as charged, and he admitted the prior jail term. The trial court suspended imposition of sentence and granted a three-year term of probation including 44 days in county jail.

B. Facts of the Offense

Liah and his wife A.R. lived in a three-bedroom apartment with five children ranging in age from one month to 13 years. Around 10 p.m. on December 24, 2015, Liah came home intoxicated and assaulted A.R. Two of the children called 911. The police arrived soon thereafter and interviewed A.R. The prosecution played recordings of the 911 calls and the A.R. interview for the jury.

1. The 911 Calls and the Police Response

K.D., one of the daughters, was 11 years old at the time of the incident. C.D., another daughter, was 13 years old. They each called 911 in separate calls. K.D. told the operator, “[M]y dad’s hurting my mom,” and “He’s been trying to hit her and everything.”² C.D. told the operator, “[M]y mom’s bleeding, my dad’s trying to kill my mom.” When the operator asked C.D. if her father had hit her mother, C.D. responded, “I don’t know.”

The police arrived and interviewed A.R. Her eyes were red and she appeared “visibly shaken.” According to a transcript of the interview, she told the police Liah had been drinking and was demanding alcohol. He could not find any alcohol and threatened

¹ Subsequent undesignated statutory references are to the Penal Code.

² The parties put forth slightly different transcripts of this call. The differences are not material to our analysis.

to kill her and the children for hiding it. He told A.R. he would kick her teeth out if she did not give him alcohol. He also demanded the children tell him where the alcohol was hidden. A.R. stated that she “[held] his hand and pull[ed] him in the room,” causing him to fall and hit his head. He attacked her by scratching her and hitting her in the teeth with his fist. He knocked her down and fell on top of her, whereupon the children tried to pull him off her. A.R. thought Liah hit her two or three times. She said her “teeth [were] bleeding” but that she had washed the blood away. The interviewing officer did not observe any injuries to A.R. A.R. also told the police that Liah had hit her and scratched her in the past, and he had bitten her finger a couple days earlier.

Liah was sitting on the couch when the police entered the apartment. He had glassy eyes and slurred speech, and he had two lacerations on his forehead. He also had a small cut on the back of his right hand.

2. Trial Testimony

At trial, A.R., C.D., and K.D. largely recanted the statements they had given to the police on the night of the incident. A.R. testified that she had been hoping to enjoy a happy Christmas Eve when Liah came home drunk and hid some alcohol somewhere in the house. A.R. found some of the alcohol, put it in a bedroom, and told Liah he could not have any more. Liah responded that he would go buy more alcohol if she did not give it to him, and he accidentally swung his hand, hitting her mouth. Her gums were bleeding “just a tiny bit,” and she rinsed out the blood. A.R. denied that Liah threatened to kill her or knock her teeth out. She testified that other than swinging his arm and hitting her accidentally, she did not touch him in any way.

On cross-examination, A.R. testified that she told Liah he was drunk and should go to sleep, but that did not work. She tried to get him to go to a bedroom to lie down and sleep it off. Defense counsel asked A.R. if she tried to take him somewhere by the hand, and she responded, “I just grab his hand and tell him that, ‘Go to sleep.’ . . . And

he doesn't." A.R. testified that she was standing in a bedroom doorway when Liah told her, "Get out of my way," whereupon he swung his arm and hit her with an open hand.

II. DISCUSSION

A. Failure to Instruct on Self-Defense Against False Imprisonment

Using CALCRIM No. 3470, the trial court instructed the jury that Liah was not guilty if he acted in lawful self-defense based on a reasonable belief that "he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully." However, Liah contends the trial court erred by failing to instruct the jury that he also had the right to defend himself against false imprisonment by his wife—i.e., when A.R. blocked a doorway and prevented him from leaving a bedroom. Liah concedes that his trial counsel never requested such an instruction, but he contends we should consider the merits of the claim under section 1259 (allowing appellate courts to consider the refusal to give an instruction absent a request "if the substantial rights of the defendant were affected thereby.") Alternately, he contends his trial counsel provided ineffective assistance. The Attorney General contends the trial court had no sua sponte duty to provide an instruction of self-defense based on false imprisonment because trial counsel failed to request one, and it was not supported by the evidence.

1. Legal Principles

“ ‘ “It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence” ’ and ‘ “necessary for the jury’s understanding of the case.” ’ [Citations.] It is also well settled that this duty to instruct extends to defenses ‘if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ [Citations.]” (*People v. Brooks* (2017) 3 Cal.5th 1, 73 (*Brooks*)). We apply the de novo standard of review to claims of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

Under section 692, “Lawful resistance to the commission of a public offense may be made: [¶] 1. By the party about to be injured.” (§ 692.) Under section 693, “Resistance sufficient to prevent the offense may be made by the party about to be injured: [¶] 1. To prevent an offense against his person, or his family, or some member thereof.” (§ 693.)

Section 236 defines the public offense of false imprisonment as “the unlawful violation of the personal liberty of another.” (§ 236.) “The crime of false imprisonment, whether misdemeanor or felony, requires for its commission some intended confinement or restraint of the person. It is not necessary there be confinement in jail or prison. Any exercise of force or express or implied threat of force by which in fact the person is restrained from his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is such imprisonment. The imprisonment may be committed by acts or words merely operating on the will of the individual and/or by personal violence. The acts must be done, the words must be said, with the intent of causing the confinement.” (*People v. Haney* (1977) 75 Cal.App.3d 308, 313.)

To establish ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To prove prejudice, the defendant bears the burden to show a reasonable probability that, but for his trial counsel’s errors, the result would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one “ ‘sufficient to undermine confidence in the outcome.’ ” (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Deficient performance is rarely shown if there was a tactical reason for trial counsel’s conduct. (*People v. Cruz* (1980) 26 Cal.3d 233, 255-256 (*Cruz*).)

2. The Trial Court Properly Instructed the Jury on Self-Defense

Liah argues that the evidence showed he struck A.R. while she was standing in a doorway, preventing him from leaving the bedroom. While the trial court instructed the

jury on self-defense, Liah contends the jury also should have been instructed that he was not guilty if he was defending against the crime of false imprisonment. As Liah concedes, however, his trial counsel never requested any such instruction and never objected to the self-defense instruction provided by the trial court. As the Attorney General points out, defense counsel never tried to present any such defense. In closing argument, counsel challenged the prosecution theory that Liah attacked A.R. Counsel relied on weaknesses in the evidence, including the inconsistent statements by the prosecution's witnesses and the lack of visible injuries to the victim, to argue that the evidence did not show beyond a reasonable doubt that Liah intentionally hit A.R.

We conclude the trial court had no sua sponte duty to instruct the jury on self-defense against false imprisonment. First, defense counsel never relied on any such theory for Liah's defense. Nor did the evidence suggest or support such a defense. "The trial court is not required to anticipate every possible theory that may fit the facts or fill in every time a litigant or his counsel failed to discover some obscure, but possible, theory of the facts. [. . .] There is no duty on the trial court to dissect the evidence in an effort to develop some arcane, remote or nebulous theory of the evidence on which to instruct. The duty of the trial court involves percipience - not omniscience." (*People v. Cram* (1970) 12 Cal.App.3d 37, 41.) Furthermore, Liah's defense—that the victim's statements were inconsistent and the evidence ambiguous—was inconsistent with the defense asserted here by appellate counsel. The trial court therefore did not err by instructing the jury on self-defense based solely on CALCRIM No. 3470. (*Brooks, supra*, 3 Cal.5th at p. 73.)

Because trial counsel did not request any instructions on false imprisonment as grounds for self-defense, Liah now contends his trial counsel was ineffective. But he cannot show ineffective assistance if his counsel made a reasonable tactical decision in declining to request the instruction. (*Cruz, supra*, 26 Cal.3d at pp. 255-256.) The record shows counsel decided to challenge the strength of the evidence that Liah intentionally

struck or attacked A.R. Counsel likely made a tactical decision that it would be inconsistent, unpersuasive, or confusing to the jury to argue instead that Liah struck A.R. because he was defending against false imprisonment. For the same reason, Liah’s “substantial rights” under section 1259 were not affected by counsel’s failure to request an instruction on false imprisonment. (See *People v. Woods* (1991) 226 Cal.App.3d 1037, 1055.) Even assuming counsel should have requested such an instruction, the evidence supporting this theory was weak. Although Liah characterizes A.R.’s testimony as “unequivocal,” our examination of the record shows her testimony was vague and ambiguous about whether she unlawfully prevented Liah from leaving the bedroom. Accordingly, Liah cannot show he was prejudiced under *Strickland*—that is, he cannot show a reasonable probability the outcome would have been different if his trial counsel had requested the instruction.

For the reasons above, we conclude this claim is without merit.

B. Failure to Give a Unanimity Instruction

Liah contends the trial court erred by failing to instruct the jury that it must unanimously agree on the facts underlying his conviction for corporal injury upon a spouse. He contends that different jurors could have found different conduct constituted the offense—his hitting A.R., his pushing her to the ground, or his scratching her. The Attorney General contends no unanimity instruction was required because the evidence showed Liah’s actions constituted a continuous course of conduct.

1. Legal Principles

“In California, a jury verdict in a criminal case must be unanimous. [Citations.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the specific offense he is charged with. [Citation.] Therefore, when the evidence suggests more than one discrete crime, either: (1) the prosecution must elect among the crimes; or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act.

[Citations.]” (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.) “There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation], or ‘when . . . the statute contemplates a continuous course of conduct or a series of acts over a period of time.’ [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

2. No Unanimity Instruction Was Required

Liah argues that jurors could have looked to three distinct acts as a basis for the conviction. A.R. made statements—albeit inconsistently—asserting that Liah had hit her in the mouth, scratched her, and pushed her to the ground. Liah contends the jury should have been required to decide unanimously on which of these acts formed the basis for his conviction.

We are not persuaded. While the evidence was vague concerning the exact sequence of events, the record shows all the conduct took place during a short period of time. Two of the children placed brief calls to 911 contemporaneous with the attack, and the police arrived a short time later. None of the witnesses described any significant break in the timing of events or any period of separation between Liah and A.R. amidst the conduct underlying the offense. Looking at the witnesses’ statements and testimony as a whole, the evidence compels the conclusion that Liah’s conduct—even if it consisted variously of hitting, scratching, or knocking A.R. down—occurred as part of a continuous course of conduct. Under these circumstances, no unanimity instruction was required. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 225 [no unanimity instruction required where conduct underlying conviction for corporal injury on a spouse was based on a course of continuous conduct].)

Furthermore, while Liah characterizes the prosecution's closing argument as advocating for several distinct incidents of spousal battery, our examination of the record does not support this claim. The prosecutor referred to evidence that A.R. was both hit and scratched, but the argument was consistent with a description of multiple injuries inflicted during a single continuous attack. Similarly, Liah contends his trial counsel put forth multiple defenses against each of the alleged acts, but our examination of the record shows Liah's defense at trial was unidimensional: Counsel relied on inconsistencies and ambiguity in the evidence to argue that the prosecution had failed to prove beyond a reasonable doubt that Liah intentionally attacked A.R.

For the reasons above, we conclude the trial court did not err by refusing to instruct the jury on unanimity. As to Liah's claim that he was cumulatively prejudiced by the error from both this claim and the failure to instruct on false imprisonment, we need not consider cumulative prejudice because we do not find multiple errors. Accordingly, we will affirm the judgment.

III. DISPOSITION

The judgment is affirmed.

Greenwood, P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Danner, J.

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